LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 17 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. POPE, SUMMER-MINTER AND ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

MOTION OF APPELLEE H. F. STUBBS TO DISMISS

JAMES R. HARLAND, JR.
822 Fulton Federal Building
Atlanta, Georgia 30303
(404) 522-1641
Attorney for Appellee, H. F. Stubbs

Of Counsel
HARRY L. CASHIN, JR.
SIMUEL F. BOSTER, JR.
HUIE and HARLAND
822 Fulton Federal Building
Atlanta, Georgia 30303
(404) 522-1641

Date: January 17, 1972

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
I. The Nature of the Case and the State Statute Allegedly Involved	2
A. State Statute Allegedly Involved	2
B. Nature of the Case and Proceedings Below	3
II. The Judgment Appealed From Rests on an Adequate Non-Federal Basis	6
III. The Case Presents No Substantial Federal Question Not Previously Decided by This Court	11
IV. Conclusion	23

TABLE OF CITATIONS

Cases

Admiral Company v. Thomas, 164 F. Supp. 569 (D.D.C. 1958)	20
Armille v. Lovett, 100 N.H. 203, 122 A.2d 265 (1956)	20
Armstrong v. Manzo, 380 U.S. 545 (1965)	17
Bell Silver & Copper Mining Co. v. First National Bank, 156 U.S. 470 (1895)	13, 15, 18
Boddie v. Connecticut, 401 U.S. 371 (1971)	8
Brunswick Corporation v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970)	17
Cook v. Georgia Fertilizer & Oil Co., 154 Ga. 41, 113 S.E. 145 (1922)	9
Covey v. Summers, 351 U.S. 141 (1956)	16

Curti v. Pacific Mtge. Guaranty Co., 87 F.2d 42 (9th Cir. 1936) 19

Equitable Royalty Corp. v. Oklahoma, 352 P.2d 365 (Okla. 1960) 19

Fuentes v. Faircloth, 317 F.Supp. 954 (S.D. Fla. 1970) (3-judge Ct.) 18

Gamble v. White, 56 F.2d 814 (10th Cir. 1932) 19

Gault, In Re, 387 U.S. 1 (1967) 17

Giordano v. Stubbs, 228 Ga. 75, 184 S.E.2d 165a (1971) 3, 11

Great Falls National Bank v. McCormick, 448 P.2d 991 (Mont. 1968) 20

Jewell v. City of Covington, 459 F.2d 459 (5th Cir. 1970) 10

Johnson v. Zerbst, 304 U.S. 458 (1938) 8

Lambert v. California, 355 U.S. 225 (1957) 17

Lancaster Security Investment Corp. v. Kessler, 159 Cal.App.2d 649, 324 P.2d 634 (1958) 19

McCormick v. First National Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971) 9, 17

Marin v. England, 385 U.S. 99 (1966) 17

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 15, 16, 18, 22

New York v. New York, N.H. & H. R.R. Co., 344 U.S. 293 (1953) 16

Pierce v. Somerset R.R. Co., 171 U.S. 641 (1898) 8

Schroeder v. New York, 371 U.S. 208 (1962) 16

Schultz v. Walker, 130 F.2d 907 (7th Cir. 1942) 20

Scott v. Paisley, 271 U.S. 632 (1925), affirming 158 Ga. 876 .....7, 12, 13, 14, 15, 17, 18, 22

Shepard v. Baron, 194 U.S. 553 (1904) 8
Smith v. Bell, 129 W. Va. 749, 41 S.E.2d 695 (1947) ... 9, 20
Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969) 15, 17, 22
United States v. Brosnan, 363 U.S. 237 (1960) 20, 21
Walker v. City of Hutchinson, 352 U.S. 112 (1956) 16
Wall v. Parrot Silver & Copper Co., 244 U.S. 407 (1917) 8
Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970) 10, 15, 17, 21

Statutes

Georgia Code Annotated:
Section 29-401 9
Section 29-401.1 9
Section 39-1101 2
Section 39-1102 2
Section 67-1301 3
Section 67-1305 9
Section 67-1506 ..... 2, 6, 7, 8, 10, 11, 12, 14
Section 67-2501 9
Federal Tax Lien Act of 1966, Section 7425, Internal Revenue Code of 1954 21

Miscellaneous Authorities

3 *R. Powell, Real Property*, ¶ 468, p. 696.28, n. 2 and 696.30, n. 12 (1970 ed.) 18
10 *G. Thompson, Real Property*, § 5180, pp. 233-237 (Grimes ed. 1957) 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. POPE, SUMMER-MINTER AND ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

MOTION OF APPELLEE H. F. STUBBS TO DISMISS

Appellee H. F. STUBBS moves the Court to dismiss the appeal herein on the grounds that (1) the judgment appealed from rests on an adequate non-federal basis, and (2) the case presents no substantial federal question not previously decided by this Court.

I

THE NATURE OF THE CASE AND THE STATE STATUTE ALLEGEDLY INVOLVED

A. State Statute Allegedly Involved

This appeal calls into question the long-standing procedures of many states with regard to security interests in land and the means of exercising same. Specifically, Appellants attack the constitutionality of contractual powers of sale in deeds to secure debt. More precisely, they seek to overturn a Georgia statute which recognizes the freedom of contracting parties to waive statutory notice requirements in foreclosure proceedings.

The statute allegedly at issue is 1935 Georgia Laws 381, Georgia Code Annotated § 67-1506, which provides:

> "No sale of real estate under powers contained in mortgages, debts, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of sheriff's sales in the county in which such real estate, or a part thereof, is located."

Indirectly, by necessary reference, the Georgia statutes concerning notice as to sheriffs' sales, Georgia Code Annotated §§ 39-1101, 39-1102, are likewise called into question. These latter sections require notice of such sales by publication in a newspaper published in, or of general circulation in, the county in which the sale is to take place once a week for four weeks immediately preceding the date of the sale. Thus, these statutes permit the exercise of a contractual power of sale in a security deed in accordance with the terms thereof, and in the absence of specific contractual terms as to notice of the sale, they require notice to all interested parties by advertisement once a week for four weeks.

Appellants contend that these statutes deprived them of their subordinate security interest in the property in question without due process of law by failing to require that they be given actual notice of the time and terms of the foreclosure sale. Appellee Stubbs submits that the constitutionality of these statutes is not properly in issue here for the reason that the foreclosure sale in question, and the notice given thereof, were conducted in accordance with the provisions of a private contract and were not governed by, or carried out pursuant to, statutory foreclosure procedures.

B. Nature of the Case and Proceedings Below

The facts of the case are adequately summarized in the opinion of the Georgia Supreme Court from which this appeal is taken, *Giordano v. Stubbs*, 228 Ga. 75, 184 S.E. 2d 165 (1971) (attached as Appendix A to Appellant's Jurisdictional Statement), and require only a brief restatement here. Appellee Stubbs conveyed a tract of land by warranty deed to one Donald Gaston in 1963, receiving as partial consideration therefor a promissory note and a deed to secure debt, which secured the payment of the note. There were no prior encumbrances on the property, so that Stubbs' security interest became the senior encumbrance. Under Georgia law, the security deed constituted an absolute conveyance of title to Stubbs, subject to the right of the grantor to have the property reconveyed to him upon payment of the debt secured thereby. GA. CODE ANN. § 67-1301. Thus Stubbs received legal title to the property, Gaston taking equitable title or an equity of redemption. The security deed contained a power of sale authorizing Stubbs to sell the property at public auction in the event of a default in payment of the note.

Gaston subsequently conveyed his equity of redemption in the property to a third party, who in turn conveyed it

to the Appellants, in each case the purchaser assuming the obligation of satisfying the outstanding promissory note given by Gaston to Stubbs. The Appellants then conveyed their equity of redemption to one Bob E. L. Pope in 1969, and received in partial consideration therefor a promissory note and a second deed to secure debt. Appellants concede that this second security interest was subordinate to the outstanding security interest of Stubbs under his prior security deed.

Hence, when the principal balance and accrued interest under the 1963 promissory note from Gaston to Stubbs came due on November 14, 1969, Pope was record owner of the property in question, subject to the senior security interest of Stubbs and the junior security interest of Appellants. Stubbs wrote to the Appellants on November 1, notifying them that his note was due and payable on November 14. On December 11, after the debt had been in default for approximately one month, Stubbs gave written notice to his original grantor, Gaston, of the default and of his intention to exercise the power of sale in the security deed if the note was not paid in ten days. By copy of said letter, he provided like notice to the then owner of record, Pope. These notices were not required by the security deed or by Georgia law, either of which would have authorized Stubbs to begin proceedings to exercise the power of sale as of the date of the default.

Thereafter, Stubbs received no response nor tender of payment on the note from anyone, and accordingly proceeded to exercise the power of sale by publishing notice of the sale once a week for four weeks as provided in the security deed. On the advertised date, the property was sold to the highest bidder at public outcry from the steps of the Gwinnett County, Georgia, courthouse.

After the sale had taken place, Appellants instituted this action in the DeKalb County Superior Court to

annul the sale and to enjoin any proceeding to confirm the sale. The Appellants raised various issues, including fraud, conspiracy to defraud, and absence of valid title to exercise the power of sale. However, the only issue relevant here was injected by the Appellants by amendment to their complaint, to-wit: whether exercise of the power of sale by Stubbs upon notice by publication in accordance with the terms of the security deed, and without giving Appellants actual, personal notice of the sale prior thereto, deprived Appellants of their junior security interest in the property without due process of law.

All parties filed motions for summary judgment, which were denied by the trial court. Each of the parties then appealed the denial of their respective motions to the Supreme Court of Georgia. On September 27, 1971, the Georgia Supreme Court affirmed the trial court's denial of Appellants' motion, but reversed the trial court as to the motions of Appellee Stubbs and the other Defendants and ordered that summary judgment be entered for all Defendants.

All of the issues raised by Appellants, including the notice issue, were disposed of by the Georgia Supreme Court on grounds of state contract and property laws. However, Appellants seeks to have this Court overturn that judgment on the sole ground that the failure of Georgia law to require Appellee Stubbs to give them actual, personal notice of the exercise of the power of sale, notwithstanding the express contractual waiver of personal notice in the security deed, resulted in a deprivation of their junior security interest without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

II

THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In framing the "questions presented" in their Jurisdictional Statement, Appellants conveniently ignored the existence of the contractual power of sale in Appellee Stubbs' security deed and the fact that the foreclosure sale was conducted pursuant thereto. They would have this Court believe that the sale was governed by Georgia Code § 67-1506, which requires, in the absence of contractual provisions to the contrary, that notice by published advertisement be given prior to the exercise of powers of sale contained in mortgages, deeds to secure debt, and other such security instruments. They contend that such published notice is, as to holders of junior security interests in the subject property, insufficient to satisfy the requirements of due process of law. The legal insubstantiality and impractical consequences of this contention are discussed in Part III *infra*, beginning at page 11. However, Appellee Stubbs would first submit that the abstract constitutionality of § 67-1506 need not be considered by this Court for the reason that the judgment of the Georgia Supreme Court on the notice issue rested on adequate non-federal grounds, to-wit: that the notice required of Appellee Stubbs in exercising the power of sale in question was not governed by Georgia Code § 67-1506, but rather by the contractual terms of the security deed which created the power.

In selling the property at public auction to satisfy the defaulted note from Gaston, Appellee Stubbs was exercising the power of sale contained in the deed to secure debt which he received from Gaston in 1963. The Georgia Supreme Court began its opinion by quoting the provisions of this power of sale, which authorized Stubbs, in the

event of default, to sell the property at auction at the county courthouse to the highest bidder "after advertising the time, terms and place of such sale once a week for four weeks immediately preceding such sale (but without regard to the number of days) in a newspaper published in the county where the land lies, or in the paper in which the sheriff's advertisements for such county are published, *all other notice being hereby waived by grantor, . . .*" 228 Ga. 75, 77, 184 S.E.2d 165, 167 (1971) (emphasis added). The Court then held:

> This deed constituted a contract between Gaston as grantor and Stubbs as grantee, and *its provisions are controlling as to the rights of the parties and their privies.* Stubbs complied with its terms. . . . *Giordano complains that he was not notified; however, the record shows otherwise.* There is nothing in the security deed, nor in the laws of Georgia, which would require Stubbs to give actual notice that he was exercising the power of sale. *Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed.*

Ibid. (emphasis added). The Court then quoted from *Scott v. Paisley*, 271 U.S. 632 (1925), discussed *infra* at p. 12, which affirmed 158 Ga. 876, 124 S.E. 726, to support the validity of contractual notice provisions in security deeds.

In short, Appellee Stubbs, in exercising the power of sale, was compelled to, and did, comply with the notice provisions contained in that power of sale. Coincidentally, the notice provisions contained in the security deed were identical to the notice requirements in Georgia Code § 67-1506, which would have governed in the absence of contractual terms specifying the notice required. However, it is clear from the above-quoted language of the opinion

that the Georgia Supreme Court disposed of the constitutional issue on the grounds that the published notice satisfied the terms of the security deed, not on the ground that it coincidentally met the requirements of § 67-1506 as well. In other words, the Georgia Supreme Court merely upheld the constitutional validity of contractual notice provisions; therefore, the issue of whether or not the requirements of § 67-1506 would, in the absence of contractual notice provisions, satisfy due process is not properly presented to this Court by the record in this case.

Accordingly, even if it is assumed, *arguendo*, that due process of law would, in the abstract, have entitled Appellants, and any other parties having a recorded legal or equitable interest in the subject property, to actual notice of the sale, it is clear that the right to such notice was expressly waived by the terms of the power of sale. For the deed to secure debt containing the power of sale specifically provided for notice by publication, "all other notice being hereby waived by grantor, . . ." 228 Ga. 75, 77, 184 S.E.2d 165, 167.

It is equally clear that this waiver was valid and binding, for this Court has often held that constitutional rights may be waived when no question of public policy or public morals is involved. *E.g., Boddie v. Connecticut*, 401 U.S. 371 (1971) ("the hearing required by due process is subject to waiver"); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407 (1917) and cases cited at 244 U.S. 411-12; *Pierce v. Somerset R.R. Co.*, 171 U.S. 641 (1898). This principle is particularly applicable in the case of individual property rights such as are allegedly involved here. See *e.g., Shepard v. Baron*, 194 U.S. 553 (1904), where this Court observed: "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good con-

sideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up." 194 U.S. at 568. For a thorough discussion of the waiver of constitutional property rights see *Smith v. Bell*, 129 W. Va. 749, 41 S.E.2d 695 (1947), in which the West Virginia Supreme Court reviewed numerous authorities and upheld the constitutionality of a waiver by the grantor of a deed of trust of his statutory right to personal notice of sale, noting that no considerations of public policy were involved. See also *McCormick v. First National Bank of Miami*, 322 F.Supp. 604, 607 (S.D. Fla. 1971), in which the Court held that summary repossession of an automobile without notice, pursuant to the terms of a conditional sales contract, did not violate due process or constitute an illegal search and seizure, the right to notice having been waived by the contract.

Thus, whatever notice rights Gaston, as grantor of the security deed, had under due process or state law, could have been and were expressly waived by written agreement. This waiver was part of a validly recorded security deed, and hence, under Georgia law, was binding upon all parties, including Appellants, who subsequently obtained an interest in the land. For such subsequent parties in interest were on public notice as to the terms of the recorded security deed and took their interest in the property subject to all of the terms thereof. *Georgia Code Ann.*, §§ 67-1305, 67-2501, 29-401, 29-401.1; *Cook v. Georgia Fertilizer & Oil Co.*, 154 Ga. 41, 113 S.E. 145 (1922). ("[a] security deed to land conveys the legal title to the vendee, and the rights of the vendee cannot be affected by subsequent acts of conveyance by the vendor to third parties"). Indeed, throughout these proceedings Appellants have conceded that they obtained and then reconveyed the property subject to, and with notice of, the

prior recorded security deed to Appellant Stubbs and all the terms thereof.

In summary, the power of sale, and the notice requirements applicable to the exercise thereof, were dictated by the security deed creating the power. All notice other than that provided for in the security deed was expressly waived by the terms thereof. Hence, even if due process would have compelled actual notice to the grantor, he contractually waived any such right. That such a waiver of the constitutional right to actual notice, if it exists, is valid and enforceable is beyond question. Equally without doubt is the fact that this waiver by the grantor of the security deed was binding on Appellants and all other parties taking an interest in the property from and through the grantor and subject to, and with notice by recording of, the prior security deed.

Accordingly, the failure of Appellants in this case to receive actual notice was not caused by Georgia Code §67-1506, but rather by the contractual waiver of all notice other than by publication. Therefore, as the District Court for the District of Columbia recently observed in the very similar case of *Young v. Ridley*, 309 F. Supp. 1308, 1313 (D.D.C. 1970), Appellants' contentions "run not to the validity of the statute, but rather to the reality of the agreement . . ." Stated another way, the exercise of the power of sale was pursuant to private contract, not involving state action, and "[t]he fourteenth amendment, of course, applies only to state action." *Jewell v. City of Covington*, 459 F.2d 459 (5th Cir. 1970). The Georgia Supreme Court recognized this fact and founded its decision that Appellants were not entitled to actual notice, not on the constitutional validity of §67-1506 in the abstract, as Appellants contend, but rather on the grounds that:

> This [security] deed constituted a contract between Gaston as grantor and Stubbs as grantee, and its

> provisions are controlling as to the rights of the parties and their privies. . . . Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed.

Giordano v. Stubbs, 228 Ga. 75, 77, 184 S.E.2d 165, 167 (1971).

For these reasons, Appellee Stubbs submits that the decision of the Georgia Supreme Court denying the right of Appellants to actual notice in this case was based on adequate grounds of state contract and property laws, not on the abstract constitutional validity of Section 67-1506 of the Georgia Code, and, therefore, that this Court should dismiss this appeal.

III

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

As discussed above, Appellants have not contested the validity of the security deed which created the power of sale and specified the notice required in the exercise thereof. Rather, they have chosen to ignore the security deed and would have this Court do likewise. However, as demonstrated in Part II *supra*, the Georgia Supreme Court properly considered Appellants' attack on Georgia Code §67-1506 in the light of the contractual provisions in the security deed, and hence, so must this Court for purposes of the instant appeal. Therefore, since the notice and sale complied with the security deed, as the Georgia Court so held, Appellants' constitutional attack on §67-1506, for purposes of this appeal, must necessarily be read as urging the dual propositions that: (1) the states

are required by the due process clause of the Fourteenth Amendment to compel actual notice of foreclosure proceedings to junior encumbrancers in all circumstances; *and* (2) that the states are further required to prohibit any waiver by private contract of this right to actual notice. To the extent of rejecting this latter proposition the Georgia Supreme Court did determine the constitutionality of §67-1506 by upholding the contractual power of sale. This implicit holding that §67-1506 did not violate due process in failing to prohibit the contractual waiver of whatever form of notice due process might have required in the absence of contract is the sole constitutional determination which can be read into the Georgia Supreme Court's opinion. This implied constitutional determination does not present a substantial federal question for review by this Court for the reason that prior decisions of this Court have authoritatively rejected Appellants' position and there are no circumstances present in the instant case which would warrant its reconsideration.

That constitutional rights in general, and property rights in particular, are subject to voluntary waiver has been firmly established by this Court. See discussion at p. 5, *supra*. This proposition has been implicitly applied in circumstances similar to the instant case. In *Scott v. Paisley*, 271 U.S. 632 (1926), this Court considered an almost identical situation on writ of error to the Georgia Supreme Court. There the plaintiff in error, Mrs. Scott, had purchased land subject to an outstanding security deed. Upon default in the note secured by the security deed, the grantee brought suit against the grantor in the security deed without notice to Mrs. Scott and recovered judgment on the note. Thereafter, the sheriff levied an execution on the land, and, after advertisement, sold it at public auction to satisfy the judgment. Mrs. Scott sued to have the sale set aside on the ground that §6037 of the Georgia Code of 1910, pursuant to which the sale was

held, deprived her of her interest in the property without due process of law in that she was not given notice of the proceeding to sell the land.

In upholding the statute and the sale thereunder, the Court conclusively established the validity of contractual powers of sale and the notice provisions therein, stating:

> . . . The validity of such a contractual power of sale is unquestionable . . . in the absence of a specific provision to that effect, *the holder of a mortgage or trust deed with power of sale is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer*; and the validity of the sale is not affected by the fact that such notice is not given . . . [citations omitted] . . . "*the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust.* All that is required of him is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith. . . ."
>
> So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And §6037 neither deprives him of property without due process of law nor deprives him the equal protection of the laws.

271 U.S. at 635 (emphasis added). The Court in *Scott* relied upon the previous Supreme Court decision in *Bell Silver & Copper Mining Co. v. First National Bank*, 156 U.S. 470 (1895), as well as numerous state court decisions.

Although *Scott* involved a sale pursuant to statutory procedures, its applicability to the present circumstances was clearly indicated by the Court when it observed that the effect of §6037 was "no more than if it conferred upon the holder of the secured debt a statutory power of sale, which may be treated as equivalent, insofar as the constitutional question is concerned, to an express power of sale in a mortgage or trust deed." 271 U.S. at 635. Hence Appellants' attempt to distinguish *Scott* on the theory that there was no defense to the note involved, and therefore Mrs. Scott was not injured, seems clearly futile. For there was likewise no defense in this case to the fact that the note was valid and in default; and as to injury, Mrs. Scott suffered even greater injury than Appellants, for she was the record owner and in possession of the property at the time of the sale, so that she lost her equity of redemption, whereas Appellants held only a junior security interest in this case, having conveyed their equity of redemption to a subsequent purchaser. Therefore, in contemplation of law, Appellants may suffer no injury at all, for they still have an enforceable note against the purchaser which may be brought to judgment and satisfied out of other assets of the purchaser. All that they have lost is the right to have that note satisfied out of this particular property. Thus, the similarity of the facts and the language used by the Court compel the conclusion that *Scott* is applicable to the instant case. Indeed, the primary holding in *Scott* directly affirms the constitutionality of the notice by publication provisions of §67-1506, and would therefore require approval of the sale in question even if the contractual notice provisions had not existed or had not been applicable to Appellants.

Realizing the applicability of *Scott*, Appellants seek to establish a substantial federal question on the grounds that *Scott* has been undermined by later decisions of this Court concerning the notice required by due process in

other types of legal proceedings. It should be noted at the outset that every single case cited by Appellants for this proposition is distinguishable from the present situation on the same ground. That is, the notice procedures used in the present case were bargained for and made a part of a valid contractual agreement, whereas in the cases relied upon by Appellants the notice procedures were not agreed to by the plaintiffs or their privies in contract. This distinction, which presumably motivated Appellants to ignore the security deed in framing their "questions presented," has been recognized by the lower federal courts. See, e.g., *Young v. Ridley*, 309 F.Supp. 1308 (D.D.C. 1970), in which the Court, citing *Scott* and *Bell Mining*, upheld the District of Columbia statute authorizing foreclosure under contractual powers of sale. Rejecting the due process argument, "[t]he Court [was] not persuaded that the Supreme Court in *Sniadach* [Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969)] intended to question these previous opinions approving contractual powers of sale." *Id.* at 1312.

Appellants place primary reliance upon *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), in which this Court invalidated a New York statute which permitted trust companies to pool small trust accounts into a common fund for investment administration. The statutory provisions allowing judicial settlement of the common fund among the participating accounts upon notice by publication was held to be a denial of due process as to those trust beneficiaries whose names and addresses were known to the trust company. In so holding, the Court made it clear that notice by publication would satisfy due process under many circumstances.

There is nothing in *Mullane* which would cast doubt upon the legal capacity of contracting parties to specify the form of notice required and to waive the notice which might

otherwise be required by statute or due process; for there was no such waiver or contractual agreement as to notice present in *Mullane*, nor were the beneficiaries actually notified of the proceedings. On the other hand, the Appellants in this case were notified by Stubbs of the fact that the note was due. With this notice, and their knowledge of the existence of the power of sale in the recorded security deed, Appellants had ample opportunity to ascertain that the note was in default, that the power of sale was being exercised, and to appear and bid at the sale. Their complete lack of diligence to act upon their knowledge, not any unfair conduct on the part of Stubbs, resulted in their junior security interest being cut off. For these reasons, *Mullane* is clearly inapplicable to the present case.

Each of the *Mullane* progeny cited by Appellants is likewise distinguishable for the same legal and factual reasons. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), involved the condemnation of property by a city after only published notice of the hearing on compensation. The compensation hearing was obviously a judicial proceeding in the nature of litigation, and is clearly distinguishable from a private sale under power pursuant to a contract of which all interested parties had notice. The same distinctions apply to *Schroeder v. New York*, 371 U.S. 208 (1962), which also involved proceedings in the nature of condemnation, as well as to *Covey v. Summers*, 351 U.S. 141 (1956), which held that notice by publication of foreclosure proceedings to satisfy a tax lien was not reasonably calculated to protect a person known by the city officials to be mentally incompetent.

Other notice cases relied upon by Appellants are subject to the same distinctions and involve even more remote factual situations. *New York v. New York, N.H. & H.R.R. Co.*, 344 U.S. 293 (1953), involved a deprivation of the city's non-contractual lien rights upon published

notice of a bankruptcy reorganization, whereas *Marin v. England,* 385 U.S. 99 (1966), protected a bank in honoring checks drawn by a bankrupt after the filing of a voluntary bankruptcy petition of which the bank had no notice. Even further removed are *Lambert v. California,* 355 U.S. 225 (1957) (registration requirements for convicted felons); *Armstrong v. Manzo,* 380 U.S. 545 (1965) (adoption proceedings without notice to natural father); and *In Re Gault,* 287 U.S. 1 (1967) (juvenile court hearing without notice).

Lastly, Appellants rely on the more recent case of *Sniadach v. Family Finance Corporation,* 395 U.S. 337 (1969), which has promoted considerable analysis of the current view of this Court concerning procedural due process. *Sniadach* invalidated a Wisconsin statutory procedure which allowed the freezing of an alleged debtor's wages during the period between the filing of a garnishment and the rendering of a judgment on the debt. Aside from the fact that the debtor had not contractually agreed to prejudgment garnishment, there was no question of notice involved since the defendant received notice of the proceedings on the same day as the garnishee. As previously noted at page 15 *supra,* the distinctions between *Sniadach* and contractual foreclosure proceedings were clearly recognized in *Young v. Ridley,* 309 F.Supp. 1308, 1313 (D.D.C. 1970), in which the Court noted "the differentiating element of a bargained-for procedure" and "the importance of the bargain concept to the validity of summary foreclosure" as voiced by the Supreme Court in *Scott v. Paisley* and the *Bell Mining* case. The Tenth Circuit has likewise rejected the applicability of *Sniadach* to summary repossession and sale of secured property pursuant to the terms of a conditional sales contract on the grounds that the procedure used was expressly agreed to. *Brunswick Corporation v. J & P, Inc.,* 424 F.2d 100, 105 (10th Cir. 1970). *Accord, McCormick v. First National*

Bank of Miami, 322 F.Supp. 604, 607 (S.D. Fla. 1971); *Fuentes v. Faircloth*, 317 F.Supp. 954 (S.D. Fla. 1970) (3-judge court).

Thus, despite the passage of many years, *Scott* and *Bell Mining* have retained their vitality because of the sound legal principle upon which they are based, *i.e.*, that parties are free to establish and regulate their private property rights by contract. Even in the absence of contractual notice provisions, *Scott* teaches that parties are on record notice as to all contractual and statutory provisions binding upon their real property, and that they are therefore charged with the duty of making such inquiries and taking such action to protect their interests as this knowledge dictates. This is but another reason why *Scott* has not been vitiated by *Mullane* or its progeny.

For these reasons, powers of sale as a means of exercising security interests have continued to be prevalent throughout the United States, and the validity of proceedings held under such powers has been repeatedly sustained. This is demonstrated by a review of authorities in the real property field. The 1970 edition of *Powell on Real Property* notes that at least twenty-one states recognize foreclosure of security interests in land by power of sale, 3 R. POWELL, REAL PROPERTY ¶468, p. 696.28, n. 2 (1970 ed.), and that "notice is customarily given by advertisement." *Id.* at p. 696.30 and cases cited in n. 12. Similarly, the following observations on powers of sale are contained in 10 G. THOMPSON, REAL PROPERTY §5180 (Grimes ed. 1957):

> The notice usually required in powers of sale is a publication for a certain length of time in one or more newspapers published in the county in which the premises are situated.

Id. at p. 233.

> In the absence of statutory requirements, the kind of notice, place where it shall be given, the time when

it shall be given, and the duration or number of publications *are properly subjects of contract between the parties, and their agreement is binding upon them.*

Id. at p. 234 and cases cited in n. 41 (emphasis added).

No notice at all is necessary unless made so under a statute, or by virtue of the power itself. When there is no statute requiring the creditor to give notice to the debtor of his intention to exercise the power of sale, and the instrument contains no provision in reference to notice other than that the time and place shall be advertised in a given way, no other notice is required than advertisement in the manner prescribed in the instrument . . . *The notice when provided for may be waived* . . .

Id. at 235 and cases cited in nn. 47, 48, 52 (emphasis added).

When a power of sale provides only for a published notice, this is all that any one interested in the property is entitled to, unless there be an agreement for an express notice.

Id. at 236 and cases in n. 55 (emphasis added).

Unless the statute or the mortgage so provides a junior encumbrancer is not entitled to a notice of the sale.

Id. at 237 and cases in n. 66.

Representative cases through the years which have relied upon *Scott* and *Bell Mining* to sustain the constitutional validity of the exercise of contractual powers of sale on notice by publication include: *Curti, v. Pacific Mtge. Guaranty Co.*, 87 F.2d 42, 43 (9th Cir. 1936); *Gamble v. White*, 56 F.2d 814, 821 (10th Cir. 1932); *Equitable Royalty Corp. v. Oklahoma*, 352 P.2d 365, 372 (Okla. 1960); *Lancaster Security Investment Corporation v. Kessler*, 159 Cal. App. 2d 649, 324 P.2d 634, 637-38 (1958);

Armille v. Lovett, 100 N.H. 203, 122 A.2d 265, 267 (1956); *Smith v. Bell*, 129 W.Va. 749, 41 S.E.2d 695 (1947); *cf. Schultz v. Walker*, 130 F.2d 907 (7th Cir. 1942); *Admiral Company v. Thomas*, 164 F. Supp. 569, 570 (D.D.C. 1958); *Great Falls National Bank v. McCormick*, 448 P.2d 991 (Mont. 1968).

Finally, the rationale of *Scott* was indirectly affirmed by this Court in 1960 in *United States v. Brosnan*, 363 U.S. 237 (1960). *Brosnan* involved two cases in which federal tax liens were extinguished under state law, one by a judicial foreclosure sale and the other by a private sale pursuant to a power of sale in a deed of trust. In each case the United States was not made a party to, and had no notice of, the sale proceedings. In each case the tax liens were concededly junior to defaulted mortgages. Thus, the United States stood in a position virtually identical to that of Appellants, although the issue was not cast in terms of due process because the government was the aggrieved party. Even though the government had not contractually waived notice of the foreclosure proceedings, as was done in the instant case, this Court nevertheless sustained the sales and their effect of cutting off the tax liens. In so doing, the Court wrote:

> . . . [W]hen Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. *Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt.*

363 U.S. at 242 (emphasis added).

The effect of *Brosnan* was reversed by Congress by the Federal Tax Lien Act of 1966, codified as Section 7425 of the Internal Revenue Code of 1954, which makes any judicial or non-judicial foreclosure sale ineffective to discharge recorded federal tax liens unless the United States has notice of the proceedings. However, the respect of *Brosnan* for established state property laws and its recognition of the disruption which would result from a wholesale invalidation of same remain viable and applicable to the private procedures challenged in the instant case. For if this Court were to hold that contracting parties may not agree to waive a particular form of notice which might, in the absence of agreement, be required, such a decision would invalidate innumerable time-honored laws and usages in every state governing real property, personal property and the law of contracts in general. Holders of security interests in all types of property would be saddled with the unreasonable burden of having to track down all parties having lien rights, security interests, or other legal or equitable interests in the property before exercising their right to have a defaulted debt satisfied out of the property. Moreover, every completed foreclosure proceeding, judicial or non-judicial, would, absent a bar by the statute of limitations, be subject to annulment, and countless security deeds presently on the books would be rendered virtually meaningless. The result would be complete chaos as to real and personal property ownership throughout the country. As stated by the District Court for the District of Columbia in upholding a statute authorizing extrajudicial foreclosure proceedings under power of sale, "[a] contrary decision would cast doubt on the validity of many provisions normally contained in commercial instruments which traditionally have been thought properly subject to the contractual agreement of the parties." *Young v. Ridley*, 309 F.Supp. 1308, 1313 (D.D.C. 1970). Such a

result was not intended by, nor can it be implied in, *Mullane*, nor *Sniadach*, nor any of the other post-*Mullane* notice cases.

In summary, the record in this case does not present the question posed by Appellants of whether the authorization, in §67-1506, of foreclosure upon notice by publication only, in the absence of contractual notice provisions, violates due process. *Scott v. Paisley* and other decisions of this Court indicate that were this issue present, it should be answered in the affirmative. Be that as it may, a contractual waiver of all notice other than by publication was present in this case. It was upon this contract and Stubbs' compliance therewith, as well as upon the fact that Appellants had actual notice that the note was due and that the power of sale existed, that the Georgia Supreme Court rested its decision upholding the adequacy of the notice given. Therefore, for this Court to entertain this appeal and reverse the Georgia Supreme Court, it would have to hold not only that due process requires actual notice of foreclosure proceedings to junior encumbrancers in all circumstances, but also that the notice rights inherent in procedural due process may not be contractually waived. Such a decision would seem to be conclusively precluded by *Scott v. Paisley* and other opinions of this Court, as well as by the chaotic results which such a ruling would produce. For these reasons it is respectfully submitted that the federal question sought to be raised by this appeal is so unsubstantial as not to require further argument and that the appeal should therefore be dismissed.

IV

CONCLUSION

Wherefore, Appellee H. F. Stubbs moves the Court to dismiss this appeal on the grounds that the judgment appealed from rests on an adequate non-federal basis and the case presents no substantial federal question not previously decided by this Court.

Respectfully submitted

/s/ JAMES R. HARLAND, JR.
Attorney for Appellee, H. F. Stubbs

Of Counsel:
HARRY L. CASHIN, JR.
SIMUEL F. DOSTER, JR.
HUIE and HARLAND
822 Fulton Federal Building
Atlanta, Georgia 30303
(404) 522-1641

Certificate of Service

I, James R. Harland, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a true and correct copy of the foregoing Motion to Dismiss has been served upon counsel of record for Appellants in this case, by placing same in the United States mail, postage prepaid, addressed to Mr. Hugh W. Gibert, Haas, Holland, Levison & Gibert, 2709 First National Bank Tower, Atlanta, Georgia 30303.

This 20th day of January, 1972.

/s/ James R. Harland, Jr.